

SERVED: August 8, 2000

NTSB Order No. EA-4850

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of August, 2000

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JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15980
v.)	
)	
DAVID VAUGHN McCAULEY,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on July 6, 2000, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's airman medical certificate on allegations that his history of alcohol dependence and encephalitis disqualifies him from holding any class of

¹An excerpt from the hearing transcript containing the initial decision is attached.

medical certificate, pursuant to sections 67.107(a)(4), 207.(a)(4), and 307(a)(4); and 67.113(b)(1), 213(b)(1) and 313(b)(1) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 67.² For the reasons discussed below, the appeal will be denied.³

The Administrator's June 6, 2000 Emergency Order of Revocation alleges, among other things, the following facts and circumstances concerning the respondent:

²Sections 67.107(a)(4), 207.(a)(4), and 307(a)(4); and 67.113(b)(1), 213(b)(1) and 313(b)(1) are two sets of identical provisions relating to first, second and third-class medical certificates. We cite here, in relevant part, only the first of each set:

§ 67.107 Mental.

Mental standards for a first-class airman medical certificate are:

(a) No established medical history or clinical diagnosis of any of the following:

* * *

(4) Substance dependence....

For purposes of this proceeding, substance dependence means "a condition in which a person is dependent on a substance,...as evidenced by...[c]ontinued use despite damage to physical health or impairment of social, personal, or occupational functioning" (see 67.107(a)(4)(ii)(D)).

§ 67.113 General medical condition.

The general medical standards for a first-class airman medical certificate are:

* * *

(b) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition finds—

(1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held....

³The Administrator has filed a reply opposing the appeal.

1. At all times hereinafter mentioned, you were the holder of Airman Certificate Number 489589873, with airline transport privileges.

2. At all times hereinafter mentioned, you were the holder of an Airman Medical Certificate—First Class, issued on September 30, 1999.

3. On or about July 22, 1999, at St. Luke's Northland Hospital, you were clinically diagnosed by your physician as suffering from "alcoholism," and "metabolic encephalopathy secondary to alcohol use...."

4. The physician further stated in the Discharge Summary that, "at that time, he (David McCauley) had progressive mental deterioration" and that "he is a heavy alcohol drinker and has been for many years."

5. Finally, the physician stated in his Discharge Summary that:

I have advised him (David McCauley) to go to Alcoholics Anonymous and never to drink again lest he have further problems and die from the subsequent problems.

6. On February 7, 2000, the Manager, Aeromedical Certification Division, FAA, advised you in a certified letter that hospital records disclosed that you did not meet the medical standards prescribed in Part 67 of the Federal Aviation Regulations (FARs) by virtue of your alcohol dependence and encephalitis and are not qualified for any class of medical certificate.

7. On or about April 26, 2000, the Regional Flight Surgeon advised you in a certified letter, that your history of alcohol dependence and encephalitis was a disqualification [sic] for an airman medical certificate and that you could voluntarily return the medical certificate issued to you on September 30, 1999. The certificate has not been returned.

8. As a result of your substance abuse and/or encephalitis referred to above, you are not qualified to hold any class of Airman Medical Certificate.

The law judge found that the Administrator's evidence established the allegations of the emergency order of revocation. The law judge was not persuaded by the belief of respondent's medical expert, an individual who specializes in holistic and alternative

medicine, that respondent's emergency hospitalization was brought on by a bleeding ulcer rather than by symptoms associated with alcohol-induced end-stage liver disease.⁴ The law judge was also not persuaded by the efforts of respondent's wife to repudiate or explain away statements concerning respondent's heavy drinking history that she had made to hospital personnel when respondent was admitted.⁵ We find nothing in respondent's appeal brief which would justify disturbing the law judge's assessment of the medical and other evidence.

On appeal, respondent first contends that the law judge erred because he did not grant a motion to dismiss the order of revocation at the close of the Administrator's case. This is not an issue we will entertain. Since the respondent decided to go forward with his defense after the Administrator rested, we will not undertake to determine whether enough evidence had already

⁴Respondent was essentially comatose when admitted to the hospital in July 1999. He had been brought in during the middle of the night after awaking and vomiting a large volume of blood. At the hospital, it was determined that he still had about a quart of blood in his stomach, a circumstance his treating physician attributed to gastric varices developed because of long-term excess consumption of alcohol. Respondent's impaired mental functioning (the observed encephalitis or obtundity) resulted, in the opinion of this physician, who believed then and now that respondent is an alcoholic, from high levels of ammonia in his blood that his badly compromised liver was unable to detoxify. No exception to the treating physician's diagnoses was taken by any of the several-member team of doctors at the hospital with whom he consulted for respondent's care.

⁵Her account of respondent's excessive drinking, which she reported as amounting to about a twelve-pack of beer per day, is consistent with his subsequent advice to an Airman Medical Examiner (AME), in September 1999, that the hospitalization resulted from his having drunk too much.

been admitted to survive a motion to dismiss. Instead, we will only determine whether the evidence in the record as a whole supports the Administrator's order. See Administrator v. Lindsay, NTSB Order No. EA-4095 (1994) at page 5, *aff'd* 47 F.3d 1209 (1995). We are satisfied that it does.⁶

The record discloses that respondent's hospitalization in July 1999, for treatments related to his use of alcohol, followed his dismissal, in May 1999, from a position as pilot for Raytheon Travel Air, a Part 135 operator, for alcohol-related reasons.⁷ Although counsel for respondent argues that Raytheon should not have fired respondent because he, it is claimed, was not on duty when tested for drugs or alcohol, we do not think his duty status matters for purposes of applying the regulatory definition of substance dependence.⁸ It seems to us, as the Administrator maintains, that where an individual is terminated from employment

⁶Respondent does not specifically or separately challenge the Federal Air Surgeon's judgment that the finding of encephalopathy is itself a disqualifying medical circumstance under FAR sections 67.113(b)(1), 213(b) and 313(b).

⁷For reasons that are not in the record, respondent, who lives in Kansas City, Missouri, was summoned to Raytheon corporate headquarters in Wichita, Kansas, one morning on a day when he was not scheduled to fly. He submitted to drug and alcohol testing (blood and urinalysis) and tested positive for alcohol. In his testimony, respondent stated that Raytheon had advised him that he was being released for being under the influence while on duty. Tr. at 267.

⁸In other words, if respondent continued to use alcohol (and ended up in the hospital) despite losing his job as a pilot because he used alcohol, it makes no difference that his alcohol use had not been shown to have affected his job performance as a pilot.

for alcohol use, it can fairly be said, in the language of the regulation, that that individual's use of alcohol had damaged or impaired his "occupational functioning." Consequently, respondent's subsequent hospitalization, and the information concerning his alcohol use it established, combined with the job termination, fully justified the judgment that respondent had a substance dependence; to wit, alcohol.⁹

Last, we find no merit in respondent's contention to the effect that the Administrator may not revoke an airman medical certificate if more than 60 days have elapsed since it was issued.¹⁰ We recognize that FAR section 67.407(c) purports to limit the Federal Flight Surgeon's authority to reconsider an AME's issuance of a certificate to a 60-day period.¹¹ However,

⁹Whether the respondent still has a substance dependence problem that is disqualifying is not before us, although much of his evidence at the hearing and some of his arguments on appeal seem to be directed more at demonstrating his present medical condition than his medical circumstances at the time of his hospitalization. Respondent is, of course, free to reapply for an airman medical certificate and attempt to establish that he is currently qualified. His claim of abstention from alcohol since his hospitalization and his evidence of recent tests indicative of some restoration of normal liver function would, we assume, be relevant to such a reapplication.

¹⁰The Federal Air Surgeon did not raise an issue concerning respondent's September 30, 1999 medical certificate until February 7, 2000. The delay appears to have resulted from the unexplained failure of the AME who issued the certificate to responsibly describe in his comments on the certificate application, to which copies of the hospitalization records appear to have been attached, the nature or seriousness of respondent's hospitalization, which he explained simply as "in hospital 7-99 for aspiration pneumonia...no present problems or lung findings...."

¹¹FAR section 67.407(c) actually contemplates that an AME-

that provision does not, in our view, preclude a subsequent investigation pursuant to 49 U.S.C. 44709 that produces the judgment that a certificate holder lacks medical qualification. The Administrator under this provision retains the right to revoke the medical certificates of those airmen who either should not have been issued a certificate in this first instance or who become unqualified after receiving a certificate. The relevant difference between the two provisions is, we think, that in a revocation action the Administrator has the burden of proving that an airman is not qualified to hold a certificate previously issued, whereas the applicant bears the burden, whenever a certificate is applied for, of proving that he or she meets the medical standards.

(..continued)

issued certificate might be subject to reconsideration for up to 120 days:

The authority of the Administrator under 49 U.S.C. 44702, to reconsider the action of an aviation medical examiner is delegated to the Federal Air Surgeon; the Manager, Aeromedical Certification Division; and each Regional Flight Surgeon. Where the person does not meet the standards of §§ 67.107(b)(3) and (c), 67.109(b), 67.113(b) and (c), 67.207(b)(3) and (c), 67.307(b)(3) and (c), 67.309(b), or 67.313(b) and (c), any action taken under this paragraph other than by the Federal Air Surgeon is subject to reconsideration by the Federal Air Surgeon. A certificate issued by an aviation medical examiner is considered to be affirmed as issued unless an FAA official named in this paragraph (authorized official) reverses that issuance within 60 days after the date of issuance. However, if within 60 days after the date of issuance an authorized official requests the certificate holder to submit additional medical information, an authorized official may reverse the issuance within 60 days after receipt of the requested information.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;¹² and
2. The initial decision and the Administrator's order of revocation are affirmed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, BLACK and CARMODY, Members of the Board, concurred in the above opinion and order.

¹²Respondent has filed a motion seeking leave to correct his appeal brief, which, it is asserted, misstated the testimony of one of the two doctors who testified for the Administrator. Specifically, where respondent's brief states (page 5, line 6) that the treating physician at the hospital characterized respondent's liver as small and hard, the testimony actually was that his liver was large and soft. Our review of the transcript reveals no mention of respondent's liver as "soft" or "large." Rather, the doctor stated that he recalled the liver as being "enlarged." Tr. at 116. Because we have read respondent's brief in light of the actual testimony, no formal correction is necessary.